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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 UNITED STATES OF AMERICA,

8 Respondent,

9 v.

10 BENJAMIN KYKER,

11 Petitioner.

Case No. 2:13-cr-00212-KJD  
2:16-cv-01395-KJD

ORDER

12 Presently before the Court is Petitioner Benjamin Kyker's Motion to Vacate, Set Aside,  
13 or Correct Sentence under 28 U.S.C. § 2255 (#58/59/91). The Government filed responses in  
14 opposition and supplements (#65/74/96) to which Petitioner replied (#69/80/98).

15 I. Background

16 Kyker pled guilty to one count of carrying and use of a firearm during and in relation to a  
17 crime of violence under 18 U.S.C. § 924(c) as charged in Count Two of the indictment. Count  
18 Two specifically charged conspiracy to interfere with commerce by robbery as charged in Count  
19 1 of the indictment, as the predicate crime of violence. Count Two specified no additional or  
20 alternative predicate felony. This Court then sentenced Kyker to eighty-four months of  
21 imprisonment to be followed by three years of supervised release. In the instant motion, Kyker  
22 moves to vacate his § 924(c) conviction and sentence pursuant to Johnson v. United States, 135  
23 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319, 2336 (2019), and requests that  
24 the court vacate his conviction.

25 II. Analysis

26 On June 17, 2016, Kyker brought his Abridged Motion to Vacate under Section 2255.  
27 Kyker's Petition relied on the reasoning in the then-recently-decided Johnson v. United States,  
28 135 S. Ct. 2551 (2015), which invalidated, as unconstitutionally vague, the residual clause of the

1 Armed Career Criminal Act. Kyker asserted that his conviction on Count 2 was unconstitutional  
2 because it was predicated on the similarly-worded residual clause of Section 924(c). After  
3 briefing, the Petition was held in abeyance pending resolution of related questions before the  
4 Supreme Court in Beckles v. United States, 136 S.Ct. 2510 (2016) and Dimaya v. Lynch, 803  
5 F.3d 1110 (9th Cir. 2015), cert. granted, 137 S.Ct. 31 (2016). On October 2, 2019, the Court  
6 granted unopposed motions to set a briefing schedule to address United States v. Davis, 139 S.  
7 Ct. 2319 (2019), which held that Section 924(c)'s residual clause is unconstitutionally vague.

8 Section 2255 authorizes this Court to “vacate, set aside, or correct the sentence” of a  
9 federal prisoner on “the ground that the sentence was imposed in violation of the Constitution or  
10 laws of the United States, or that the court was without jurisdiction to impose such sentence, or  
11 that the sentence was in excess of the maximum authorized by law, or is otherwise subject to  
12 collateral attack[.]” 28 U.S.C. § 2255(a). To warrant relief under Section 2255, a prisoner must  
13 allege a constitutional or jurisdictional error, or a “fundamental defect which inherently results in  
14 a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of  
15 fair procedure.” United States v. Timmreck, 441 U.S. 780, 783 (1979) (quoting Hill v. United  
16 States, 368 U.S. 424, 428 (1962)).

17 Section 924(c) generally prohibits the possession, carrying or use of a firearm in relation  
18 to a crime of violence and carries a mandatory sentence. At the time of Kyker's January 28, 2014  
19 sentencing, the predicate “crimes of violence” for a Section 924(c) conviction were defined by  
20 the “elements” or “force” clause, 18 U.S.C. § 924(c)(3)(A), and by the (now-unconstitutional)  
21 residual clause, 18 U.S.C. § 924(c)(3)(B).

22 Davis found Section 924(c)(3)(B)'s “residual clause” to be unconstitutional. In doing so,  
23 the Supreme Court invalidated a conviction under Section 924(c) that was predicated on  
24 conspiracy to commit Hobbs Act Robbery because it relied on the residual clause's definition of  
25 a “crime of violence.” Davis follows a line of cases that began with Johnson finding convictions  
26 and sentences under “residual clauses”—clauses that define crimes of violence as crimes that “by  
27 their nature” tend to involve violence—unconstitutionally vague.

28 Davis rejected a Section 924(c) conviction that was predicated on Hobbs Act Conspiracy

1 because Hobbs Act Conspiracy can only be defined as a crime of violence under Section  
2 924(c)'s residual clause. Davis, 139 S. Ct. at 2325, 2336. Kyker argues that his Section 924(c)  
3 conviction was likewise predicated on Hobbs Act Conspiracy and is therefore unconstitutional.  
4 The Government argues that because Defendant admitted to committing the predicate felony  
5 Conspiracy to Commit Hobbs Act Robbery when he pled guilty to the 924(c) violation, that the  
6 Court should substitute, as a lesser included offense, the conspiracy offense for the 924(c)  
7 conviction, and then sentence Kyker to time served. However, Conspiracy to Commit Hobbs Act  
8 Robbery is not a lesser included offense of the 924(c) violation. Further, the Court dismissed that  
9 count as part of the plea agreement when Defendant pled guilty to Count Two.

10 The Government might have had a better argument if Kyker's Section 924(c) conviction  
11 had been predicated upon the Hobbs Act Conspiracy count and the Hobbs Act Robbery count  
12 charged in Count 3. See United States v. Hunter, 887 F.2d 1001, 1003 (9th Cir. 1989) ("We have  
13 long held section 924(c)(1) defines a separate crime rather than merely enhancing the  
14 punishment for other crimes. Because all elements of the crime created by section 924(c)(1) must  
15 be proved for conviction under that section, a defendant charged with violating section 924(c)(1)  
16 must be proven to have committed the underlying crime, but nothing in the statute or the  
17 legislative history suggests he must be separately charged with and convicted of the underlying  
18 offense")(citations omitted); Higa v. United States, 413 F.Supp.3d 1012, 1017-18 (D. Haw.  
19 2019) (accord with Hunter: 924(c) does not require a conviction for a qualifying predicate  
20 offense).

21 The problem for the Government is that the indictment, in Count Two, alleged only  
22 Conspiracy to Commit Hobbs Act Robbery as a qualifying predicate offense. The section 924(c)  
23 conviction could also have been sustained using the Hobbs Act Robbery offense identified in  
24 Count 3 of the Indictment as an alternative predicate crime of violence. That is true even though  
25 Kyker was not convicted of Count 3 and even though Count 3 was dismissed at sentencing. As  
26 previously identified, the Ninth Circuit has held that Section 924(c) does not require an  
27 underlying or predicate conviction, only underlying conduct. Hunter, 887 F.2d at 1003.

1           However, in Hunter (drug trafficking offense) and Higa (Hobbs Act Robbery) the  
2 government initially charged second, or alternative, predicate crimes of violence upon which the  
3 Court could rely after the other predicate had been invalidated. See also Duncan v. United  
4 States, Nos. 2:17-cv-00091-EJL, 2:07-cr-00023-EJL2019, WL \*4-5 (D. Idaho November 15,  
5 2019) (upholding 924(c) conviction where alleged predicate felony kidnapping was found not to  
6 be a crime of violence but the alternatively alleged predicate first-degree murder was).

7           Kyker is correct that a conviction under Section 924(c) based on Hobbs Act Conspiracy  
8 should properly be vacated following the Supreme Court's ruling in Davis that Section  
9 924(c)(3)(B) (the “residual clause”) is unconstitutional. Hobbs Act Robbery cannot serve as the  
10 predicate offense for his Section 924(c) conviction because the indictment charged the  
11 underlying predicate offense as conspiracy to commit Hobbs Act Robbery, and no other  
12 predicate, though it was well within the Government’s power to do. See also Davila v. United  
13 States, 843 F.3d 729, 731 (7th Cir. 2016) (Section 924(c) does not require a conviction for a  
14 qualifying predicate offense because the statutory language only references another crime “for  
15 which the person may be prosecuted” – “it does not require a prosecution for or conviction of  
16 that other offense” and the defendant admitted facts establishing that he committed the other  
17 charged predicate offense for drug trafficking). Here, there is no other charged predicate offense  
18 in Count Two.

### 19 III. Conclusion

20           Accordingly, IT IS HEREBY ORDERED that Petitioner Benjamin Kyker’s Motion to  
21 Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (#58/59/91) is **GRANTED**;

22           IT IS FURTHER ORDERED that **JUDGMENT (#43)** of conviction entered January 31,  
23 2014 is **VACATED**;

24           IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for  
25 Petitioner and against Respondent in the corresponding civil action, 2:16-cv-01395-KJD, and  
26 close that case;

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1 IT IS FURTHER ORDERED that the Bureau of Prison release BENJAMIN  
2 KYKER forthwith;

3 IT IS FINALLY ORDERED that any term of supervised release is **TERMINATED**  
4 **IMMEDIATELY.**

5 Dated this 31st day of March, 2020.

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8 Kent J. Dawson  
9 United States District Judge  
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